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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of

Revision of Rules and Policies for the
Direct Broadcast Satellite Service

IB Docket No. 95-168

PP Docket No. 93-253

To: Chief, International Bureau

**INITIAL COMMENTS OF
DIRECT BROADCASTING SATELLITE CORPORATION**

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SUMMARY

Direct Broadcasting Satellite Corporation ("DBSC"), a DBS permittee, responds herein to the Commission's NPRM proposing new policies and rules for the DBS service. DBSC is one of the entities whose early DBS channel requests could not be accommodated in 1989 when the Commission granted a series of DBS applications. Like others, DBSC was given only 11 of the 16 channels it sought, but was also offered the opportunity to participate, on an equitable and pro rata basis, in the reallocation of any DBS channels which were subsequently vacated by other DBS permittees. As a result of a recent decision involving Advanced Communications Corporation 27 channels at 110° W.L. are now available. However, the Commission proposes in the NPRM to retroactively change the rules of the road, denying DBSC its fair share of the vacated channels, and instead to auction the 27 channels to the highest bidder.

The Commission's proposal is unlawful. DBSC reasonably relied on the Commission's earlier commitment and has spent millions of dollars and many years bringing its DBS proposal to the point where it will be able to provide service in 1997. The rationales relied upon by the Commission to justify its last-minute policy change are factually and legally erroneous. Reallocating the vacated channels by auction will not accelerate the point at which the channels can be put to use. The Commission's assertions to the contrary are mere speculation, fueled by its eagerness to use its new auction authority. Similarly, the Commission misreads the provisions of section 309(j) in concluding that the authorizations at issue here would be "initial" licenses so as to fall within the ambit of the auction statute. In fact, for DBSC the authorization for additional channels is merely a minor amendment and an incremental change in its existing

authority and would not be initial in any sense of the word. Nor would the reallocations of the vacated channels according to the prior policy create any unjust enrichment.

The Commission should therefore abandon its plan to auction the 27 channels and instead allocate them according to long-standing policy on which many DBS pioneers reasonably relied.

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In a Notice of Proposed Rulemaking in the above-styled matter ("NPRM"), FCC 95-443, rel. October 30, 1995, the Commission proposed certain revisions to its rules and policies concerning the Direct Broadcast Satellite ("DBS") service. Direct Broadcasting Satellite Corporation ("DBSC"), a conditional permittee in the DBS service, herewith files its Initial Comments in response to the NPRM.

I. Introduction

The NPRM proposes a series of interrelated changes to long-standing Commission policy and development of new policy concerning the DBS service. The proposals include a radical revision of the DBS channel reallocation policy as initially established by the Commission in 1989; a proposed procedure to auction certain orbit/spectrum resources recently withdrawn from a DBS permittee; new due diligence requirements for entities acquiring DBS authorizations in the future, new policy concerning limits on spectrum, new rules concerning the pairing of east/west channels and new rules governing the provision of service and competition in the DBS industry.

DBSC has been a conditional permittee in the DBS service since 1989 (File No. DBS 88-08). In the six years since grant of its application DBSC has expended millions of dollars in its efforts to build and operate a two satellite DBS system. Along the bumpy and difficult road, it has often found it necessary to wrestle with seemingly endless delays imposed on it by the FCC. Nevertheless, DBSC has initiated the construction phase of its spacecraft construction contract and anticipates beginning service in late 1997, approximately two years from the filing date of these Comments.

The Commission's proposal to deny DBSC its fair, pro rata share of the 27 channels at 110° W.L. which the Commission has withdrawn from Advanced Communications Corporation,¹ breaks faith with DBSC, denies it an important augmentation to its 11 channel system, misconstrues the nature of the DBS industry, and is unlawful for a number of reasons, all of which are set forth below in detail.

II. The Proposed Auction of The Advanced Channels Is Unlawful, Unwise and Unfair

Since 1989 Commission policy with respect to the assignment of individual DBS channels to applicants has been to meet each applicant's request so far as possible consistent with the available resources and evenhanded treatment of all applicants, and, in those cases where applicants' channels requests could not be fully satisfied, to promise to each applicant a pro rata right to additional channels if any were subsequently vacated voluntarily or by Commission action. Continental Satellite Corporation, 4 FCC Rcd 6292 (1989), partial

¹Advanced Communications Corporation, FCC 95-428, rel. October 18, 1995, FCC Rcd ("Advanced MO & O"), appeals docketed sub nom. Advanced Communications Corporation v. FCC (D.C. Cir, Case No. 95-1551), Tempo DBS, Inc. v. FCC (D.C. Cir, Case No. 95-1560) and PrimeStar Partners, L.P. v. FCC (D.C. Cir, Case No. 95-1561).

recon. den. 5 FCC Rcd 7421 (1990). This policy, as set forth in Continental, is quoted in par. 7 of the NPRM:

[I]n the event the permit of any of these applicants, or of any of the current permittees, is surrendered or canceled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications (footnote omitted).

Although the NPRM omits to say so, the reallocation policy adopted in the Continental decision was reaffirmed in EchoStar Satellite Corporation, 7 FCC Rcd 1765, 1772 (1992). As a consequence of this policy, because DBSC was awarded only 11 channels in 1989, even though it had applied for 16, it acquired equitable rights to its proportionate share of the channels ultimately awarded to Advanced. Others were treated similarly. Continental at 6299 to 6301.

DBSC's history has been elaborated in formal Commission filings on a number of recent occasions.² In brief, DBSC is one of the DBS pioneers, having filed its first DBS application in 1982. In the application partially granted by the FCC in 1989, DBSC sought to build and operate a then-state-of-the-art 16 transponder spacecraft. Although the award of only 11 channels to DBSC in the Continental decision was a sharp disappointment, DBSC nevertheless persevered, believing that at worst an 11 channel system was a feasible starting point, and hoping that along the way others would relinquish their assigned channels, allowing DBSC to recapture the 5 channels which it had been denied initially.

² See, e.g., Request for Additional Time to Construct and Launch Direct Broadcast Satellites (File No. 126-SAT-EXT-95), pp.2-9, filed July 17, 1995 and Application for Authority to Provide International DBS Service (File No. DBS-88-08/94-13DR), pp.5-7, filed September 9, 1994.

DBSC took no position on the merits in the Advanced case. It has, however, advised the Commission by letter dated July 7, 1995, that in the event Advanced were to lose its 27 channels at 110° W.L., DBSC intended to claim its rights to a pro rata share of those channels.³ Nevertheless, in the Advanced proceeding and as elaborated in the NPRM, the Commission has disregarded the long-standing equities earned by DBSC (and others who have rights under the Continental decision), and determined that the public interest would be better served by auctioning the newly-available Advanced channels. This decision violates a number of settled doctrines of administrative law, is inconsistent with the FCC's auction authority, is not adequately justified by the speculative rationale advanced by the Commission, and is seriously damaging to enterprises such as DBSC which have expended millions of dollars in the expectation that the Commission would not radically, and for no apparent reason, alter its own policies.

a) The Commission's Abrupt Shift in Its DBS Channel
Reallocation Policy Is Not Legally Sustainable

Administrative agencies are free to alter policies as events and circumstances evolve, but the law requires that such alteration must be pursuant to a reasoned analysis which is discernible to a reviewing court. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C Cir. 1970), cert. den. 403 U.S. 923 (1971). Although the NPRM dutifully provides a discussion to support the proposed alteration in policy, none of the arguments articulated by the NPRM will stand up to close analysis. The NPRM's principal justification for abrogating

³ Letter from Harley W. Radin, DBSC, to William F. Caton, FCC Acting Secretary, dated July 7, 1995, re. reallocation of DBS channels from Advanced Communications Corporation to other DBS permittees or licensees (File Nos. DBS-94-11EXT et al.)

its Continental reallocation policy is that providing only 4 channels to each of six applicants would delay additional DBS service by making piecemeal incremental assignments.

The DBS operators receiving such piecemeal assignments, the Commission opines, would require time to sort out the ultimate disposition of the additional channel assignments, whereas the auction approach, presumably, would lead to the award of a large number of channels to one DBS licensee within only a few months. NPRM, pars. 9-17. The NPRM also contends that the slow development of the DBS service since the Continental decision of 1989 demonstrates that the prior policy was not effective. In addition, reliance on the auction technique, it is said, reclaims some of the value of the spectrum for the public, and directs the spectrum assets to the party which values them most highly.

The contention that the interested parties--those entitled to divide up the Advanced channels under the Continental regime--could not expeditiously resolve among themselves how to put the additional channels to use is mere supposition. There is nothing in the public record to support the NPRM's bland assurance that an expeditious resolution of the matter is beyond reach. In fact the Commission has not given the parties any opportunity to do so. If expedition is really the Commission's great concern, it could grant the additional channels to the eligible DBS industry participants and establish a reasonable deadline by which the parties must have reached agreement among themselves with or without staff participation⁴

⁴ DBSC made just such a suggestion in its July 7th letter to the Commission referenced above. The staff has acknowledged receipt of the letter in footnote 125 of the Advanced MO & O but has not made any attempt whatever to respond on the merits to DBSC's suggestion. In its letter, a copy of which is appended hereto, DBSC noted the following: "DBSC suggests that the staff convene and participate in an informal meeting of all existing DBS permittees or licensees, i.e. parties who have colorable rights under
(continued...)"

or on an individual basis made commitments for the use of the frequencies. The fact is that numerous plans to reallocate the Advanced frequencies can be developed; fragmentation of the 27 channels at 110° W.L., contrary to the Commission's easy assumption, is readily avoidable. Alternatively the Commission could employ alternative dispute resolution proceedings such as a negotiated rulemaking to resolve the issue.⁵ Given the hundreds of millions of dollars each DBS licensee must commit to its project and the looming prospect of competition through upgraded cable, VDT technology or MMDS service, it is fair to assume that the parties themselves are fully aware of the need to expeditiously resolve the issues presented. At the very least, they should be given a chance to do so.

DBSC cannot, of course, speak for any other DBS permittee or licensee. DBSC itself currently anticipates having its first satellite, DBSC-1, in orbit in approximately two years. If it had additional channels available to it, whether four or five,⁶ those channels

⁴(...continued)
the Continental decision to one or more of the Advanced channels.... The purpose of the meeting should be to seek a consensus among the named entities, if at all possible, as to the disposition of the Advanced channels. Such a meeting of the minds, if deemed to be in the public interest by the staff, could save all concerned parties, not least the staff, substantial effort and expense which would otherwise be required to adjudicate claims among the contending parties. Even more important, a negotiated solution could advance the day -- perhaps by as much as two years -- when the various DBS players have solved their regulatory difficulties and attendant delays, and can concentrate their resources on providing DBS service to the public." DBSC has never received any reply to its letter.

⁵ See 47 C.F.R. section 1.18 and Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission Is A Party, 6 FCC Rcd 5669 (1991).

⁶ The NPRM assumes that six entities are entitled to a share of the 27 channels at 110° W.L. There are, however, three DBS channels unallocated in the eastern segment of the arc in addition to the 27 Advanced channels. One of these is at 110° W.L. and two are at 61.5° W.L. Dividing a total of 30 channels by six applicants yields five for each

(continued...)

would also be in service at that time. DBSC's 16 channel proposal was premised on the use of a then state-of-the-art 16 transponder satellite. DBSC currently proposes to use a 32 transponder satellite and could thus easily accommodate five additional channels.⁷ Indeed, its current satellite design would permit it to operate 16 transponders at double power, thereby improving service to the public in various ways. It is to be doubted that a new entrant, be it MCI or some other newcomer, could realistically be ready to provide service by November of 1997. Even if the currently scheduled auction date or subsequent award of channels is not delayed beyond January, 1996 by Commission or court action, a newcomer would have to procure capacity (normally a three year cycle for DBS spacecraft) in only 20 months in order to have any of the Advanced channels in service prior to the date on which DBSC could do so.

This is all the more true since the delay in bringing DBS to the public -- on which the Commission heavily relies to justify its disavowal of its prior policy -- is as much its own fault as that of any private party. To its credit the Commission has previously acknowledged in other DBS orders that it has not provided timely responses to various permittees' requests for regulatory action.⁸ For the Commission to use these self-induced delays to justify reliance

⁶(...continued)
applicant.

⁷ See DBSC Application for Minor Modification filed June 30, 1995 (File No. 123-SAT-MP-95/DBS-88-08).

⁸ See, e.g. Continental Satellite Corporation, DA 95-1733, rel. August 7, 1995, FCC Rcd; Dominion Video Satellite Corporation, Inc., DA 95-1734, rel. August 7, 1995, FCC Rcd____ (1995), recon. pending. DBSC, which waited some three and one half years from the filing of its due diligence showing to staff approval of such showing, is as good an illustration as any other

on an allegedly more efficient methodology to initiate DBS service is bootstrapping of the most obvious kind. Moreover, the early years of the DBS industry were difficult ones for every DBS applicant, as the Commission has itself acknowledged. While it was foresighted of the Commission to approve a DBS service in 1982, the fact is that neither the technology nor the investment resources were then ready to make the plunge. Today the situation is altogether different, and DBS is about to come of age on its own and without the benefit of auctions to provide a variety of services and multiple configurations.

While ignoring these factors, the NPRM glosses over the delays which the auction process will create. DBSC and undoubtedly other DBS licensees or permittees will take any auction determination to court. Given the well-publicized uncertainties and delays experienced in the PCS auctions, it would be, as Commissioner Quello rightly points out in his dissent to the Advanced decision, a miracle if the Commission's scheduling holds.⁹ Simply put, there is nothing in the public record to substantiate the Commission's assumption that an entity winning the projected January 1996 auction would be able to initiate service faster than an existing permittee which augments its capabilities through the channel reallocation scheme contemplated in Continental. In sum, the Commission's

⁹ While the Commission's NPRM sets forth an unrealistically rosy view about the likelihood of holding its projected auction as scheduled in mid January, 1996, its pleadings in the Court of Appeals are more candid. In its Response To Joint Motion For Expedited Consideration filed in the Tempo DBS, Inc. and PrimeStar Partners, L.P. appeals on November 13, 1995, the Commission notes that absent a decision from the Court of Appeals prior to, or shortly after the proposed January 18, 1996 auction, no assignee of the Advanced channels "will be able to commence investment in satellite construction thereby facilitating the prompt deployment of DBS service to the public." Id. at 6. Moreover, "[i]f this appeal remains unresolved at the time of the auction, the amounts that are bid, and even the makeup of the bidders, will be affected." Id.

expectations about rapid implementation of DBS service through an auction are based on an inadequate consideration of the practical realities of the industry.¹⁰

b) The NPRM Misconstrues Section 309(j) of the Act

The language and legislative history of Section 309(j) of the Act, on which the Commission relies to propose auctioning the forfeited Advanced channels, do not support the Commission's conclusion. With respect to the Advanced channels, it is hard to understand how the Commission's proposal is consistent with the statutory requirement that auctioning apply to "initial" licenses when DBSC and others eligible under Continental would be modifying their existing licenses or permits to add channels to those already awarded. Certainly for Advanced there is nothing "initial" about the authorization it sought to extend. It may be that for a newcomer to DBS, such as MCI, any authorization awarded following an auction would be an initial authorization within the meaning of the statute, but the question presented in the NPRM is not simply whether ab initio the channels now available at 110° W.L. should be auctioned; the question is indisputably whether those channels, to which DBSC and others have previously staked a claim -- a claim which the Commission has previously indicated it would grant in the present circumstances -- should now be auctioned. Since the effect of assigning the Advanced channels by auction would be to deprive DBSC and others of their rights to enhanced channel assignments through modification of their licenses, i.e. not through initial licenses, statutory language limiting

¹⁰ That the courts will require the Commission to articulate its auction rationale in detail has only recently been reaffirmed in *Cincinnati Bell Telephone Co. v. FCC* (6th Cir. Case No. 94-3701), in which the court remanded the Commission's decision involving structural requirements in the PCS marketplace ("[W]e...demand...that the FCC provide at least some support for its predictive conclusions.")

auctions to initial licenses is effectively short-circuited. In effect, the Commission is relying on yet another self-serving bootstrap argument to justify its preference for auctions.

The NPRM further errs in suggesting, at par. 73, subsection (c), that avoiding unjust enrichment is a statutory purpose of Section 303(j). That is simply not the case. The provision in question, Section 303(j)(3)(c), speaks of avoiding unjust enrichment through proper design of the auction procedure: it thus assumes that an auction is to be held, and mandates the Commission to design the auction in such a way as to avoid unjust enrichment.

Even if the auctions statute could be read to establish as an affirmative goal the avoidance of unjust enrichment, such a factor would not be a compelling argument in the present circumstances. Assuming transfer payments were to be made among the eligible recipients of the reallocated channels -- an outcome which is far from clear -- such payments would not involve unjust enrichment. Unlike the PCS, MMDS or SMR applicants, the eligible DBS permittees are entities who have made a long-standing, highly risky commitment to DBS and who have sustained and supported that commitment over a period of many years at considerable cost. If their commitments of hundreds of millions of dollars were buttressed by transferring some channel rights among themselves (subject to the Commission's oversight and public interest finding), it is hard to see how the public is being denied some benefit to which it is entitled. As the Commission itself has noted, there is no per se rule in the DBS context against profiting from the exchange or merger of DBS rights. DirectSat Corporation, 10 FCC Rcd 88 (1995); Advanced, *supra*, slip op. at 24.¹¹

¹¹ Indeed the Commission has recognized that otherwise appropriate protections against unjust enrichment must be considered in a broad context. In reconsidering the
(continued...)

More relevant is Section 303(j)(3)(b) which requires the Commission to consider, in choosing whether or not to rely on auctions, inter alia, the needs of small businesses. By any definition DBSC is a small business; it is one which has established by sheer tenacity that it is committed to the DBS marketplace. An auction would strain DBSC's financial resources beyond the breaking point. Simply stated, auctioning the Advanced channels to which DBSC otherwise has rights would deny those channels to DBSC and make it materially more difficult for it to compete with entities having access to greater resources. It has been costly enough for DBSC to purchase its satellites; to require it to buy the spectrum as well is simply a crushing burden.

When DBSC in May of 1995 commenced the construction phase of its contract involving expenditures in excess of \$160 million for construction of two 32 transponder spacecraft, it had in mind the staff's April 1995 cancellation of Advanced's 27 channels and expected to be assigned five additional channels so that it could use the spacecraft in a double-power mode for 16 channels. In a similar vein, Section 303(j)(6)(E) calls on the Commission to continue to seek solutions to mutual exclusivity (such as may exist at 110°

¹¹(...continued)
adoption of auction rules for PCS, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 7245 (1994), the Commission noted that certain recapture rules, designed to protect the public against early profiteering by specially advantaged designated entities, should be moderated in certain cases: "We recognize that over time, a designated licensee may have made substantial investments in a license prior to transfer. In order to reward efficiency and encourage such investments in infrastructure development, we provided that we will generally reduce the amount of the recapture penalty as time passes or construction benchmarks are met. We further provided that our recapture provisions would not apply to the transfer or assignment of a license that has been held for more than five years." (Footnotes omitted). *Id.* at 7265, par. 122. Each of these equitable and common sense factors applies to the present case.

W.L.) through negotiation and other means. Such a solution for the newly-opened channels at 110° W.L. is right under the Commission's nose: to honor its earlier and long-standing commitment to DBSC and others concerning any vacated DBS channels.

DBSC does not dispute that auctions have their place in the regulatory armorarium. Auctions can put assets in the hands of the party which most highly values them, and can capture for the public the value of orbit/spectrum resources. But blind incantation of economic principles is not a reliable guide to the public interest. In the instant case, for example, where some half dozen entities have long-standing commitments to the DBS industry, the highest value could be expected to emerge from negotiations among those industry participants. Similarly, while the auction may be expected to put a one-time up-front payment in the public treasury, the funds so expended will ultimately be reclaimed from the public in the form of higher charges, slower innovation, or some other mechanism by which the entrepreneur can recapture its upfront payment.

If, for example, MCI were to pay \$175 million (at a minimum) for the Advanced channels, and then build out its DBS system to compete with DirecTV or EchoStar, neither of which had to bear such a start-up expense, MCI would be at a severe competitive disadvantage because over time it will have to recapture the initial payment. As economists are always the first to say, there is no free lunch,' and any entrepreneur who enters a fiercely competitive market with heavy upfront expenses which its competitors have not borne must bear a significant added cost burden. The public will repay the \$175 million, visibly or invisibly.

c) Adoption of an Auction for Reallocation of the Advanced Channels is a Retroactive Alteration of Prior Policy And As Such is Subject to A Higher Standard of Review

Whether or not the Commission's selection of auction techniques to reallocate the Advanced channels would be otherwise sustainable, its retroactive effect in this case renders it unlawful. When a right or privilege has been granted by rule, administrative agencies do not have complete freedom to retroactively withdraw such rights. The leading case addressing retroactive rulemaking in the D.C. Circuit is Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380 (D.C.Cir. 1972). As articulated there, the agency's attempt to retroactively alter prior rules or policy is judged by several criteria. Among these are the degree of departure from prior practice, the reliance of the party challenging the new rule, the degree of burden imposed by a retroactive order and the public interest in applying a new rule as compared with the reliance of the challenger on the prior standard. Id. at 390. See also Yakima Valley Cablevision Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986) in which the court emphasized the need for the Commission to articulate clearly why retroactive change in long-standing policy is required by the public interest.

In the present instance, neither the Advanced decision nor the NPRM has done so. The fact is that DBSC sought 16 channels in the application which was acted upon by the Commission in 1989 and received only 11. Importantly, however, the Commission indicated in the Continental decision and reaffirmed 3 years later in the EchoStar case, that as other DBS channels became available, DBSC (and others similarly situated) could expect to receive their pro rata share. Although the Commission has spoken understandingly of the

early and difficult years for the DBS industry,¹² it now proposes to deny to DBSC and other DBS pioneers the fruits of their early efforts. Indeed, the Commission itself has recognized that an 11 channel system may not be viable¹³ but simultaneously withdraws a prior commitment to grant DBSC the long-promised additional channels to make it viable. In a word, this is unfair. Having relied on the entrepreneurial imagination and energy of DBSC and other DBS pioneers to bring the industry to the point it is at today, the Commission proposes to sell the added value to the public through the initiation of an auction, and to do so by stripping DBSC of channel rights to which it is entitled on the basis of long-standing policy.

DBSC's six year reliance on the prior reallocation policy is no less real for not having been trumpeted to the Commission. In seeking to raise the hundreds of millions of dollars necessary to construct a DBS system, and even in seeking to raise the more limited funds required to carry on through early stages of its business plan, DBSC has always been able to hold out to investors the prospect of additional channels as a result of any reallocation. Nor is the possibility that DBSC can acquire the Advanced channels through the auction a viable prospect. With commitments in place to go forward at 61.5° W.L., DBSC cannot afford to bid for the Advanced channels as a group. In effect, then, the newly determined auction process freezes out DBSC entirely from any realistic hope of increasing its channel capacity beyond 11. This is simply unfair, and no overwhelming public interest advantage has been articulated by the Commission to justify the unfairness.

¹² NPRM, slip op. at par. 106.

¹³ Id.

III. Other Proposals

DBSC does not oppose the imposition of newly fashioned due diligence requirements on entities newly entering the DBS arena. It would be improper, however, to alter the due diligence obligations with which DBSC is currently obliged to comply. The proposals to assure that no entity or affiliated group of entities can dominate the DBS marketplace through manipulation of programming availability are sound. Proposals to limit acquisition of a disproportionate amount of the available orbit/spectrum resource may be justified in individual cases but should not be applied across-the-board without reference to individual circumstances. DBSC supports extending the non-broadcast mode DBS license term to 10 years and the proposal to make the flexible use of DBS facilities a function of percentages and capacity rather than merely the passage of time.

IV. Conclusion

The decision to reallocate the vacated Advanced channels by auction is unlawful, for all the reasons set forth above. In lieu of that determination, the Commission should honor its long-standing commitment to distribute the Advanced channels among the existing DBS licensees or permittees on a pro rata basis. Not only would that method of reallocation be fair to the pioneers in the DBS industry, but more importantly it would assure faster

implementation of service on the channels in question, thereby bringing the benefits of greater DBS service to the public.

Respectfully submitted,

Direct Broadcasting Satellite Corporation

Date: November 20, 1995

by: 

William L. Fishman

Its Counsel

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Direct Broadcasting Satellite Corporation

FILE COPY

July 7, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street NW
Washington DC 20554

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JUL 7 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Reallocation of DBS Channels from Advanced Communications Corporation to Other DBS Permittees or Licensees
(File Nos. DBS-94-11EXT; DBS-94-15ACP and DBS-94-16MP)

Attn: Suzanne Hutchings, Esq.
Stop Code 0700

Dear Mr. Caton:

Direct Broadcasting Satellite Corporation ("DBSC"), a DBS conditional permittee with rights to a minimum of five additional DBS channels when and if such channels are available, hereby submits its views to the Commission on the above-described matter.

Following the decision of the Chief, International Bureau, to cancel the permit and orbit spectrum resources previously held by DBS permittee Advanced Communications Corporation ("Advanced"), Advanced Communications Corporation, DA 95-944, rel. April 27, 1995, ____ FCC Rcd, ____, 77 RR2d 1160 (1995), app. for review pending, the Commission staff has received numerous suggestions from other DBS permittees as to how the 27 channels previously held by Advanced at 110 degrees W.L. could or should be reallocated to the remaining DBS permittees. These suggestions flow primarily from language appearing in Continental Satellite Corporation, 4 FCC Rcd 6292, 6299-6300 (1989) in which the Commission indicated that if any DBS channels should become available they would be redistributed to those remaining DBS permittees whose then pending requests for channels could not be fully satisfied. This commitment was reaffirmed in EchoStar Satellite Corporation, 7 FCC Rcd 1765 at 1772 (1992).

In recent weeks EchoStar Communications Corporation, Directsat Corporation, Dominion Video Satellite Corporation, and Continental Satellite Corporation have submitted their views on this question to the staff. Indeed, the subject has proven to be so compelling that numerous entities (*e.g.*, MCI Communications Corporation) who have no standing as parties to the Advanced proceeding, nor indeed to any other DBS licensing proceeding, have offered the Commission the benefit of their views.

In its Advanced decision the International Bureau staff indicated that it would subsequently address itself to the question of the reallocation of Advanced's channels and DBSC, taking the staff at its word, has been waiting for some indication that the staff was ready to act. In the meanwhile, however, a wide variety of aspirants have felt it prudent to put their views before the Commission. DBSC has therefore concluded that, given the numerous filings of others, it would be wise for DBSC to put its views on the record.

It is the position of DBSC that the Commission's 1989 commitment to reallocate to those applicants whose channel requests could not then be fully satisfied any DBS channels which subsequently were surrendered or cancelled is a legally binding commitment. DBSC, and no doubt others, is fully prepared to protect its rights to any reallocated channels by pursuing legal remedies. We hope that doing so will not be necessary because such litigation would be time-consuming, expensive, and distracting.

Attached hereto is a plan for reallocating the 27 Advanced channels at 110 degrees W.L. together with the three channels which are as yet unassigned. DBSC believes this plan is consistent with the Commission's earlier determinations, is equitable, and is sensible from the viewpoint of competitive opportunities. More important, however, than adoption of DBSC's specific plan, is that the Bureau staff consider practical steps to resolve the matter as quickly and as efficiently as possible. The large number of channels and of existing DBS permittees or licensees means that there are countless ways to allocate the channels. Given the rapid evolution of the DBS industry, however, elaborate and extended analysis of countless options would appear less in the public interest than a resolution of the matter which does "rough justice" but which permits various DBS operators to move ahead rapidly to put the limited DBS resources to work.

To that end, DBSC suggests that the staff convene and participate in an informal meeting of all existing DBS permittees or licensees, i.e. parties who have colorable rights under the Continental decision to one or more of the Advanced channels. That is, Advanced, DirecTV, USSB, EchoStar, Directsat, DBSC, Tempo DBS, Continental Satellite Corporation and Dominion Satellite Corporation. DBSC believes that USSB and Dominion do not in fact have any rights to the Advanced channels since neither had any pending but unfillable channel requests in the Continental order. Nevertheless, as active participants in the DBS regulatory process, DBSC believes their participation would be desirable for any industry-wide resolution of the questions posed.

The purpose of the meeting should be to seek a consensus among the named entities, if at all possible, as to the disposition of the Advanced channels. Such a meeting of the minds, if deemed to be in the public interest by the staff, could save all concerned parties, not least the staff, substantial effort and expense which would otherwise be required to adjudicate claims among the contending parties.

Even more important, a negotiated solution could advance the day—perhaps by as much as two years—when the various DBS players have solved their regulatory difficulties and attendant delays, and can concentrate their resources on providing DBS service to the public. DBSC would be happy to participate in any staff-mediated effort as outlined herein

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to resolve the issues posed by the Advanced decision, and will seek in any such effort to propose solutions which are consistent with prior FCC commitments, equitable to each DBS permittee or licensee and sensible for the industry as a whole.

DBSC is pleased that MCI and other non-participants in the DBS industry have finally come to the realization that DBS is a significant force in the distribution of video and other information industry products. But the participation in the meeting suggested herein of such late-comers, who have absolutely no procedural or substantive rights to the channels in question, is clearly inappropriate and DBSC would object to their presence. A fortiori DBSC objects to the initiation of auctions, lotteries, or any other mechanism whose effect is to deprive the existing DBS permittees (or licensees) of the rights given to them in the Continental decision.

A copy of this letter has been served on each entity known to DBSC to have filed formal or informal comments with the Commission on the subject matter hereof.

Please direct any requests for further information to me at the address below.

Sincerely,



Harley W. Radin
Chairman and Chief Executive

HWR/ek

**Proposed Reallocation of Channels
Formerly Held by Advanced Communications Corporation**

- 1) This proposal is split into two parts:
 - a) **Phase 1:** Reallocation of channels *now* available among permittees *now* eligible to receive them
 - b) **Phase 2:** Reallocation of channels that *may be* available at a later time, among permittees *then* eligible to receive them
- 2) There are presently 30 channels available for reassignment: 27 arising from the Commission's revocation of Advanced Communications Corporation's construction permit and 3 unassigned channels.
- 3) For Phase 1, the Commission should simply divide the 30 available channels equally among the six permittees now eligible to receive them:

Continental
DBSC
DirecTv
DSAT
EchoStar
Tempo

- 4) The remainder of Phase 1 would be an agreement among the current permittees and the Commission staff to adjust orbital assignments, for example, as follows:
 - a) Tempo moves its current 11 channel split authorization to 110 degrees, and takes its additional five channels at the same orbital position, thus attaining 16 channels on the same polarization, all with Commission approval of the agreement;
 - b) DSAT and EchoStar take their additional 10 channels at 119 degrees, and DSAT moves its single channel from 110 degrees to 119 degrees, thereby attaining together the full 32 channels at that orbital position;
 - c) DirecTv takes its 5 new channels at 61.5 degrees or 110 degrees;
 - d) DBSC takes its additional five channels at 61.5 degrees, yielding a total of 16;
 - e) Continental would be assigned 11 channels and reallocated 5 new channels at 61.5 degrees, also yielding a total of 16;

- f) USSB would not be a party to the Phase 1 process, and would retain its 3 channels at 110 degrees; and
- g) Dominion would be assigned 8 channels at 110 degrees.

Thus the channel lineup would be as follows:

119 degrees: EchoStar 16; DSAT 16

110 degrees: Tempo 16; DirecTv 5; USSB 3; Dominion 8

101 degrees: DirecTv 27; USSB 5

61.5 degrees: DBSC 16; Continental 16

- 5) In Phase 2 the Commission would agree, as a part of the overall accommodation, to reassign any channels made available by revocation of any permits in jeopardy, such as Dominion or Continental, to *remaining permittees who do not already have 32 channels*. Thus, for example, if both Continental and Dominion were to lose their permits, the 24 additional channels would be divided equally among DBSC, Tempo, and USSB. This would give Tempo the prospect of 24 channels at 110 degrees, with the further possibility of an agreement with DirecTv and USSB to fill out the full 32 channels. DBSC and USSB would each get their additional 8 channels at 61.5 degrees, thus again filling out the full 32 channels at that orbital position.